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Supreme Court, U.S.
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NO. 85-528

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RONALD L. GOLDFARB,

Petitioner,

v.

SUPREME COURT OF VIRGINIA, ET AL.

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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18

QUESTION PRESENTED

Whether the Due Process and Commerce Clauses of the United States Constitution prevent the Virginia Supreme Court from attaching reasonable conditions promoting attorney competence to the grant of a discretionary license to practice law so long as any applicant may gain admission to the Virginia bar by taking and passing the bar examination.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 4

REASON FOR DENYING THE WRIT 5

1. Petitioner's Due Process claim has been previously considered and rejected by this Court 5

2. The analysis by the court of appeals of the commerce clause issue is consistent with prior decisions of this Court 6

3. The case is unique, is limited in scope and has no application outside the discretionary bar admission context 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (E.D.Va.), aff'd mem., 414 U.S. 1034 (1973) 2, 5

Page

Brown v. Supreme Court of Virginia,
414 U.S. 1034 (1973),
summarily aff'g 359 F.Supp. 549 (E.D. Va.) 11

Goldfarb v. Supreme Court of Virginia, et al.,
766 F.2d 859 (4th Cir. 1985) 2

Goldfarb v. Virginia State Bar,
421 U.S. 773, 788 n.17 (1975) 10

Hanover Fire Ins. v. Carr,
272 U.S. 494 (1926) 8

Hicks v. Miranda,
422 U.S. 332, 343-345 (1975) 11

Hoover v. Ronwin,
___ U.S. ___, 80 L.Ed.2d 590, 600 n.18 (1984) 10

In re Jadd,
391 Mass. 227, 461 N.E.2d 760 (1984) 9

Leis v. Flynt,
439 U.S. 438, 444 n.5 (1979) 11

Looney v. Crane,
245 U.S. 178 (1917) 8

Matter of Brown,
213 Va. 282 (1972) 2

Norfolk and Western R. Co. v. Beatty,
423 U.S. 1009 (1975)
summarily aff'g 400 F.Supp. 234 (S.D. Ill.) 11

Pike v. Bruce Church,
397 U.S. 137 (1970) 6

Page

Souix Remedy Co. v. Code,
235 U.S. 197 (1914) 8

South Central Timber Development, Inc. v. Wunicke,
104 S.Ct. 2237 (1984) 6

Supreme Court of New Hampshire v. Piper,
105 S.Ct. 1272 (1985) 9

United States v. Chicago, Milwaukee, St. Paul,
and Pac. R. P. Co.,
282 U.S. 311 (1931) 7

Western Union Telegraph Co. v. State of Kansas,
216 U.S. 355 (1909) 7

Statutes:

Va. Code § 54-67 1

Constitutional Provisions:

Art. 1, § 8 1
Art. 1, § 2 9

Rules:

Federal Rules of Civil Procedure
Rule 12(b)(6) 1

Rules of the Supreme Court of Virginia
Rule 1A:1 ..... passim

Other Authorities:

Hafter, Toward the Multistate Practice
of Law Through Admission by Reciprocity,
53 Miss. L.J. 1, 44 (1983) 9

STATEMENT OF THE CASE

Petitioner seeks this Court's review of an order of the United States Court of Appeals for the Fourth Circuit, affirming the action of the United States District Court for the Eastern District of Virginia in dismissing petitioner's complaint under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief could be granted.

The district court action was filed by petitioner Ronald L. Goldfarb on May 18, 1984, against respondents the Supreme Court of Virginia, its Clerk and Executive Secretary. Petitioner challenged the validity of Supreme Court Rule 1A:1 as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Commerce Clause, Art. I, § 8 of the United States Constitution. Rule 1A:1 was adopted pursuant to the Court's discretionary authority under Va. Code § 54-67 to admit attorneys from other jurisdictions without examination. Petitioner challenges subpart (d) of that rule, which requires the Supreme Court to determine "whether the applicant...[i]ntends to practice full time as a member of the

Virginia Bar."[1] Respondents moved for dismissal or abstention, and after argument on the motions, the district court granted the motion to dismiss.

The court of appeals thereafter affirmed, Goldfarb v. Supreme Court of Virginia, et al., 766 F.2d 859 (4th Cir. 1985), holding that petitioner's due process challenge had been raised and rejected in Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (E.D.Va.), aff'd mem., 414 U.S. 1034 (1973), a case which it described as "essentially identical to the present action." 766 F.2d at 861. The court endorsed the prior court's findings and concluded that "the requirement rationally served the interest of Virginia in insuring the

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[1]The purposes of the full time practice requirement were explained by the Supreme Court in Matter of Brown, 213 Va. 282 (1972). The court defined its rule to mean "that an applicant must show that he intends to open an office in Virginia for the practice of law and to regularly engage in the practice of law in this state." Id. at 286, n.3. (Emphasis in original.) Among the considerations which made necessary the Virginia rule was the need to ensure that out of state attorneys who sought admission without examination would "familiarize themselves with the rules of local practice and procedure." Id. at 286. The court was concerned that the demands of an out of state practice and "the infrequency of [an attorney's] contacts with Virginia law would stand in the way of his becoming a proficient Virginia practitioner." Id. at 287.

competence of attorneys practicing in the Commonwealth," 766 F.2d at 862.

As to petitioners commerce clause challenge, the court held that the rule does not constitute "an undue burden on interstate commerce" in relation to its putative local benefit of promoting "familiarity with Virginia law among attorneys who have not passed the state bar examination." 766 F.2d at 862. Noting that Virginia could have required all lawyers, including Goldfarb, to take and pass the bar examination, the court concluded that the state should not be penalized for offering the full time practice option in lieu of examination as an alternative "that many attorneys may find less onerous." 766 F.2d at 863.

Finally, the court rejected petitioner's contention that for commerce clause purposes, the admission without examination alternative must be scrutinized in isolation of other aspects of Virginia's bar admission program. The question presented, as defined by the court, was whether Virginia's bar admission policies assert "unreasonable control over interstate commerce." 766 F.2d at 864. Because the availability of the bar examination is a necessary element in

defining the extent of that assertion, the court concluded that the examination alternative must be incorporated into its Commerce Clause analysis. This being so, the court properly found that because any attorney may gain admission by taking and passing the bar examination, the Commerce Clause is not offended by the admission without examination alternative.

STATEMENT OF THE FACTS

The facts of this case are not complicated. Petitioner is an attorney licensed to practice law in several states. He resides in Virginia but maintains his office in the District of Columbia. Because he occasionally has clients in Virginia, he wants to become a member of the Virginia State Bar (VSB).

In January, 1983, he applied to the Virginia Supreme Court for admission to the VSB without examination. In response to an inquiry from the Supreme Court's Executive Secretary, he stated that he planned to maintain offices in both Virginia and the District of Columbia. His application was denied because he did not intend to practice full time in Virginia but rather would divide his practice between Virginia

and the District. Following that denial, petitioner filed this lawsuit. It is undisputed that petitioner has not been denied the right to sit and take the Virginia bar examination. If he were admitted to the bar by examination, the full time practice requirement would not apply. Further, petitioner is not precluded presently from representing clients in Virginia courts pro hac vice, so long as he affiliates a local counsel.

REASON FOR DENYING THE WRIT

1. Petitioner's Due Process claim has been previously considered and rejected by this Court.

This Court has already found that the Virginia full time practice requirement for reciprocity admission satisfies due process. In Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (E.D.Va.), aff'd mem., 414 U.S. 1034 (1973) a three judge federal panel upheld this rule against an equal protection and due process challenge, finding that the requirement rationally served the interest of Virginia in insuring the competence of attorneys practicing in the Commonwealth. This Court summarily affirmed the panel's decision. There is nothing unique or different about the case at bar which suggests that this claim should be relitigated.

2. The analysis by the court of appeals of the commerce clause issue is consistent with prior decisions of this Court.

Petitioner argues that the court's decision below cannot be reconciled with prior cases of this Court considering the commerce clause. This contention has no merit. The significant difference between this case and the commerce clause cases relied upon by petitioner is that here, petitioner is not absolutely foreclosed from maintaining his practice in the District while at the same time practicing freely in the courts of Virginia. He as an alternative available to him which will permit him to achieve that result, and that is simply taking and passing the bar exam. There were no similar alternatives available to the complainants in the commerce clause cases cited by petitioner. Thus, in South Central Timber Development, Inc. v. Wunnicke, 104 S.Ct. 2237 (1984), the "primary manufacture within Alaska" requirement was an absolute prerequisite to the purchase of Alaskan timber. Absent compliance with the in-state manufacture requirement, the complainant was absolutely barred from purchasing the low priced Alaskan wood. There is no such absolute bar in petitioner's case. Similary, in Pike

v. Bruce Church, 397 U.S. 137 (1970), Arizona law required all Arizona canteloupes to be packed at a plant in that state. Absent compliance, the complainant was prohibited from shipping them beyond state lines. There is no such absolute prohibition in petitioner's case.

Petitioner's "unconstitutional conditions" argument likewise merits no consideration by this court. His effort to equate the "privilege" of admission without examination with the "privilege" of doing business recognized in the commerce clause cases is contrived and misrepresents those decisions. Again, the "conditions" imposed on doing business in the commerce clause cases represented an absolute bar to the noncomplying business interest. See United States v. Chicago, Milwaukee, St. Paul, and Pac. R. P. Co., 282 U.S. 311 (1931) (ICC's grant of authority to reorganized corporation to issue securities subject to condition not authorized by statute; noncompliance with the illegal condition would have voided the issue); Western Union Telegraph Co. v. State of Kansas, 216 U.S. 355 (1909) (statute required payment of charter fee based upon percentage of corporation's entire authorized capital stock for payment into

state's permanent school fund as a condition of doing business within state); Hanover Fire Ins. v. Carr, 272 U.S. 494 (1926) (required payment of a 2% gross receipts tax in order to do business within state); Looney v. Crane, 245 U.S. 178 (1917) (imposition of tax upon out of state corporations according to amount of authorized capital stock as a condition of doing business within state); Souix Remedy Co. v. Cope, 235 U.S. 197 (1914) (denied foreign corporations right to sue in state court; tantamount to a denial of right to do business).

In each of these cases cited by petitioner, the "condition" struck down by this Court represented an absolute bar to doing business within the state. Petitioner is not so foreclosed from doing business in Virginia. As the district court and the court of appeals concluded, he need only take and pass the bar examination. It is the availability of this alternative which sets this case apart from all those cited by petitioner. The examination requirement may cause petitioner some minor inconvenience, but it clearly does not violate his constitutional rights, and does not justify granting the writ in this case.

Petitioner's case is of very limited application. Indeed, only one other state besides Virginia has a similar reciprocity rule. Kentucky requires an applicant to intend to perform "the major portion" of his professional activities within the state.[5] This case would likely provide no guidance to other states with different rules, such as Vermont, which requires an applicant to study for six months in the office of a Vermont attorney before reciprocity may be granted.[6]

There is no conflict among the circuits on this issue. Although petitioner seeks to create an impression of conflict by pointing to cases decided under the Privileges and Immunities Clause (Art. IV, § 2), including Supreme Court of New Hampshire v. Piper, 201 S.Ct. 1551 (1982), the opinions distinction is that those cases dealt with requirements constituting an absolute bar to admission even by

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5. This case is unique in scope and has no application outside the discretionary bar admission context.

[5]Hafter, Toward the Multistate Practice of Law Through Admission by Reciprocity, 23 Wis. L.L. 1, 44 (1981).

[6]Id.

examination. There is no such prohibition at issue in this case."[4]

Further, the opinion of the court of appeals is limited to the unique facts of this case, and has no application outside the discretionary admission context. This court has long recognized that "[i]t would be unreasonable to view the practice of professions as interchangeable with other business activities", Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975), and in particular has recognized the unique role of the practice of law:

> "Few other professions are as close to the core of the State's power to protect the public, nor is one itself so often a primary governmental function of administering justice." Hoover v. _____

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[4] Petitioner also points to a state court decision, _____ In re Labb, 137 Mass. 158 (1884) (as reflecting the option of the bar examination for registrants who choose not to comply with discretionary conditions for admission without examination. It is significant that the court _____ based a bar admission entirely on "new and varied considerations" [an examination is not an essential means in assessing qualification] known to the local law to one other than [a]ttorneyship. 137 Mass. at 158; 24 N.E. 1084 (1884) (Labb). In analyzing is beyond dispute in the case at bar, it is that the Virginia Supreme Court does not share the view of the Massachusetts Court that the bar examination is not an "essential means" of assessing knowledge of local law.

Romein, ____ U.S. ____, 88 L.Ed.2d 290, 603 n.18 (1986).

Clearly, the principles articulated by the court of appeals cannot be construed as having any application beyond the narrow circumstances of this pro hac admission case. In any event, those principles are entirely consistent with this Court's prior decisions.

Finally, the court of appeals' decision is in accord with this Court's recognition of "the traditional authority of state courts to control who may be admitted to practice before them." Leis v. Flynt, 439 U.S. 438, 442 n.2 (1979).

> There is no right of federal origin that permits [out of state] lawyers to appear in state courts without meeting that state's pro admission requirements. This Court, on several occasions, has sustained state pro hac rules that excluded out of state counsel from practice altogether or on a case by case basis. See Norfolk and Western R. Co. v. Beatty, 429 U.S. 1001 (1976) (summarily aff'g. 400 F.Supp. 234 (S.D. Ill.)); Bromo v. Supreme Court of Virginia, 414 U.S. 1034 (1973) summarily aff'g 355 F.Supp. 248 (E.D. Va.) Cf. Hicks v. Miranda, 422 U.S. 332, 343-345 (1975). These decisions recognize that the Constitution does not require that persons admitted to the bar of one state, in order to be allowed to practice in another." Id. at 443.

The Lein case and cases cited therein suggest that there is no overriding national interest which is affected by state rules permitting limited discretionary admission to practice in state courts, while the corresponding local interest has long been recognized as compelling. Petitioner's case is no different. Virginia's interest in ensuring a competent bar is indeed compelling. Its full time practice requirement for admission without examination clearly furthers that interest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

IN THE SUPREME COURT OF VIRGINIA, ET AL.

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CERTIFICATE

I hereby certify that three copies of the foregoing RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT was mailed, postage prepaid, to Conrad E. Hitchcock, Esquire, counsel of record, Public Citizen Litigation Group, Suite 700, 2000 P. Street, N.W., Washington, D.C. 20036, Attorney for Petitioner, on this 23rd day of October, 1982.

/s/ GREGORY E. LUCAS